

Fulton (Migration) [2018] AATA 4329 (21 September 2018)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Mr Stuart Alexander Fulton
CASE NUMBER:	1615950
DIBP REFERENCE(S):	BCC2015/1140306
MEMBER:	Amanda Mendes Da Costa
DATE:	21 September 2018
PLACE OF DECISION:	Melbourne
DECISION:	The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa: • cl.820.211(1)(a) to Schedule 2 to the Regulations; • cl.820.211(2)(a) of Schedule 2 to the Regulations; • cl.820.211(2)(c) of Schedule 2 to the Regulations; • cl.820.221(1)(a) of Schedule 2 to the Regulations.

1. Statement made on 21 September 2018 at 1:50pm

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner (Temporary)) visa – genuine relationship – lived together since 2014 – joint bank account and residential agreement in joint names – spend time together and with sponsor’s family – perceived as a genuine couple – statutory declarations from family and friends – photographic and oral evidence submitted – decision under review remitted for reconsideration

LEGISLATION

Migration Act 1958 (Cth), ss 5CB, 5F, 65
Migration Regulations 1994 (Cth), rr 1.09A, 1.15A, 1.20, 2.03A Schedule 2 cls 820.211, 820.221

2.

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

3. This is an application for review of a decision of a delegate of the Minister for Immigration on 22 September 2016 to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s.65 of the *Migration Act 1958* (the Act).
4. The applicant (Mr Fulton) applied for the visa on 16 April 2015 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner (Temporary)). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
5. The delegate refused to grant the visa on the basis that the applicant did not satisfy cl.820.211(2)(a), and consequently cl.820.221, of Schedule 2 to the Regulations because the delegate considered that the evidence and information provided in support of the application was not sufficient to demonstrate that the applicant and sponsor had been in a de facto relationship for 12 months at the time the visa application was lodged.
6. The applicant appeared before the Tribunal on 17 September 2018 to give evidence and present arguments. The Tribunal also received oral evidence from the sponsor (Mrs Abbie Fulton).
7. The applicant was represented in relation to the review by his registered migration agent.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The primary criteria to be satisfied at the time of application are that the applicant is not the holder of a Subclass 771 (Transit) visa and that the applicant meets one of the alternate requirements set out in cl.820.211(2), (5), (6), (7), (8), or (9): cl.820.211(1).
10. The Tribunal has reviewed Mr Fulton's movement records which also detail her visa status at various times. The Tribunal is satisfied that Mr Fulton was not the holder of a Subclass 771 (Transit) visa at the time of application. Therefore the Tribunal finds that cl.820.211(1)(a) is met.
11. The subclause relevant to Mr Fulton's circumstances is cl.820.211(2). Accordingly the issue in the present case is whether the applicant and sponsor satisfy the definition of de facto partner under s.5CB of the Act at the time the visa application was made and the definition of spouse under s.5F of the Act at the time of decision. The issue of whether the applicant is sponsored is also a relevant consideration for the Tribunal in making its decision.

Whether the parties are in a spousal or de facto relationship

12. Clauses 820.211(2)(a) and 820.221 require that at the time the visa application was made, and at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen. The Tribunal notes that a copy of the bio-pages of the sponsor's Australian passport

is on the Department of Immigration's file. On the basis of the information before it, the Tribunal is satisfied that the sponsor is an Australian citizen.

13. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.15A(3) of the Regulations, which is extracted in the attachment to this decision.

14. Were the parties in a de facto relationship at the time of application?

15. 'De facto partner' is defined in s.5CB of the Act and provides that a person is in a de facto relationship with another person to whom they are not married if they have a mutual commitment to a shared life to the exclusion of all others, the relationship is genuine and continuing, the couple live together, or do not live separately and apart on a permanent basis, and the couple are not related by family: s.5CB(2).
16. In forming an opinion whether they are in a de facto and/or spousal relationship consideration must be given to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in r.1.09A(3) of the Regulations, which is attached to this decision.
17. Persons claiming to be in a de facto relationship for a partner visa must also meet the additional criteria in r.2.03A of the Regulations. This requirement is discussed later in this decision.

Are the parties validly married at the time of decision?

18. If the parties are validly married, they may meet the requirements of a spousal relationship, but not a de facto relationship. The parties married at Sandy Bay, Tasmania on 7 April 2017. A photocopy of a marriage certificate dated 2 June 2017 was provided to the Tribunal and the Tribunal accepts this document as genuine. On the evidence, the parties were married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

19. Consideration of the r.1.09A(3) and r.1.15A(3) factors

20. Regulations 1.09A(3) and 1.15A(3) provide relevant factors for determining whether a de facto or spousal relationship exists. These factors are (a) the financial aspects of the relationship; (b) the nature of the household; (c) the social aspects of the relationship; and (d) the nature of the person's commitment to each other. As the factors in r.1.09A(3) and r.1.15A(3) are essentially the same, they will be discussed together in this decision.
21. In assessing these issues, the Tribunal has had regard to all the documents on the Department and the Tribunal's files. The Tribunal notes that much of the documentation on the Tribunal's file was not available to the delegate.

22. *The Tribunal is required to consider all the circumstances of the financial aspects of the relationship.*

23. The applicant provided the Tribunal with documentation attesting to the couple's financial arrangements when they lived in the United Kingdom and since arriving in Australia in July 2014. The material included documentation attesting to the couple's joint account with the Commonwealth Bank; utilities and other bills in joint names; residential tenancy agreements in joint names; and the purchase of a property in Old Beach, Tasmania. The Tribunal also received oral evidence from both parties regarding the approach the couple take to sharing their financial resources, in making their monthly rental payments and meeting their weekly household expenses.
24. Mr Fulton is employed as a chef and Mrs Fulton works as a Consultant in a Contact centre of a large company. They operate a joint bank account into which their salaries are deposited and from which household expenses are paid. Mrs Fulton is responsible for most of the day-to-day management of the couple's finances although they make major financial decisions together.
25. Neither member of the couple has made a will, nor have they taken out any joint loans. Mr Fulton explained that he was not able to take out a loan as he was not a permanent resident of Australia. Mrs Fulton has a loan for her motor vehicle, the repayments for which are from the couple's joint bank account.
26. Mr and Mrs Fulton have recently purchased a block of land in Hobart together from joint savings. They plan to build a house on that land in which to live.
27. On consideration of the evidence, the Tribunal finds that the couple have pooled their financial resources and share their day-to-day household expenses. The Tribunal was provided with evidence of joint ownership of real estate and is satisfied that this represents a joint commitment to a major financial asset. However, the Tribunal finds that the couple owe no legal obligation in respect of the other. The Tribunal is therefore satisfied that the financial aspects of the relationship attest to the genuine and continuing spousal relationship between the parties.

28. *The nature of the household*

29. Any joint responsibility for the care and support of children, the living arrangements of the persons and any sharing of the responsibility for housework are matters to be considered when assessing the nature of the household.
30. The Tribunal received oral evidence regarding the nature of the parties' household. The Tribunal was provided with a detailed and credible account of the couple's living arrangements in their home in Hobart where they have been living since arriving from the United Kingdom in 2014. The couple each spoke of their contribution to household tasks and responsibilities. Mrs Fulton is primarily responsible for housework and cooking whilst Mr Fulton cares for their two dogs. The couple both spoke about the fact that although Mr Fulton is a chef, his wife is responsible for cooking meals at home. They explained that Mrs Fulton finds cooking relaxing and is the fussier of the two. Mr Fulton enjoys having someone else cook for him and is happy to assist when required. The couple shop together, mainly online and share exercising their dogs.
31. On consideration of the evidence, the Tribunal finds that the couple live together and have lived together since November 2013 (apart from a short period between March and June 2014) and share responsibility for housework, even though Mrs Fulton performs the majority of those tasks. The Tribunal is therefore satisfied that the nature of the parties' household

attests to the genuine and continuing spousal relationship between the parties. The Tribunal gives significant weight to the household aspects of the relationship.

32. *The social aspects of the relationship*

33. Whether the persons represent themselves to other people as being married to each other, the opinion of the persons' friends and acquaintances about the nature of the relationship and any basis on which the persons plan and undertake joint social activities are relevant matters to be considered in determining the social aspects of the relationship.
34. The Tribunal has considered statutory declarations from third parties (family and friends) and oral and photographic evidence provided by the parties attesting to the social aspects of the couple's relationship.
35. The statutory declarations by family and friends of the couple attest to the genuine nature of their relationship. In particular, the Tribunal attaches considerable weight to the statutory declaration of Mrs Fulton's mother, Katherine Cooper, dated 9 May 2015 and the applicant's brother, Kyle Fulton dated 11 May 2016 including the initial meeting of the couple in Scotland, their move to Tasmania and their current life in Hobart.
36. Mr and Mrs Fulton told the Tribunal that in their spare time, they like to eat out in local restaurants and hold BBQs at home for their friends and family. They spend time with Mrs Fulton's family on a regular basis and Mr Fulton's parents and brother visited Hobart for a wedding celebration in February 2018.
37. The Tribunal was also provided with photographic evidence attesting to the couple's social and recreational activities, including their wedding in April 2017 and the wedding party for the couple with Mr Fulton's family from the United Kingdom, in February 2018. The Tribunal is satisfied that the photographs show the couple on outings, with friends and family, with their dogs and at their wedding celebrations at the home of the sponsor's family, and are genuine depictions of the couple's life together.
38. On the basis of the evidence, the Tribunal finds that Mr and Mrs Fulton represent themselves to others as being married to each other, and that the couple plan and undertake joint social activities. The Tribunal finds that the relationship is viewed as genuine and continuing in the opinion of the couple's family, friends and acquaintances. The Tribunal is therefore satisfied that the social aspects of the relationship attest to the genuine and continuing spousal relationship between the parties.
39. The Tribunal attaches significant weight to the social aspect of the relationship.

40. *The nature of the persons' commitment to each other*

41. The duration of the relationship, the length of time during which the persons have lived together, the degree of companionship and emotional support that the persons draw from each other, and whether the persons see the relationship as a long term one, are all aspects to be considered in determining the nature of the persons' commitment to each other.
42. Mr and Mrs Fulton initially met in July 2013 in a pub in Lerwick, Shetland Islands, Scotland. They commenced living together in November 2013 in Lerwick and apart from a period between March and June 2014, have lived together since that time. The parties explained that they moved into staff accommodation with their respective employers during that period to assist in saving money for their move to Tasmania. During that time, their relationship continued and the Tribunal is satisfied that although they were staying in separate accommodation for two months the relationship continued during that time. Apart from

Lerwick, the couple lived together in Northern Ireland in the United Kingdom, before arriving in Australia in July 2014. Since their arrival in Australia they have lived in a number of rental properties in Hobart.

43. In statements and oral evidence, the parties detailed the inception and development of their relationship since their first meeting. The relationship developed rapidly and they were committed to a life together when they commenced living together in November 2013.
44. The Tribunal was provided with a letter from Mrs Fulton's medical practitioner attesting to her physical and emotional health. The Tribunal notes that Mrs Fulton has experienced four miscarriages in the last few years. This has resulted in surgery and Mrs Fulton has been suffering from a major depressive order for which she has been prescribed medication and referred to a psychologist for counselling. During this time Mrs Fulton has had extended leave from work and has relied on her husband for support, both emotionally and financially.
45. Mr and Mrs Fulton told the Tribunal that the last three years had been very difficult due to Mrs Fulton's health concerns and the stress associated with the delegate's decision to refuse Mr Fulton's visa application. Mrs Fulton explained that in such circumstances, it was hard for them to go ahead with plans for the future given they faced the uncertainty of her husband's migration status. Both Mr and Mrs Fulton told the Tribunal that if the visa application was granted, they intended to build a home on the land they have purchased and have a family.
46. Overall the Tribunal has taken into account that a relationship has now been on foot for nearly five years and that they have overcome the not insignificant trials and tribulations of the initial visa refusal and the sponsor's health problems.
47. On consideration of the evidence, the Tribunal is satisfied regarding the duration of the relationship and the length of time the couple have lived together. The Tribunal finds that the persons draw on each other for a significant degree of companionship and emotional support, and that they view their relationship as a long term one.
48. As stated above, the Tribunal is satisfied that the parties are validly married, as required by s.5F(2)(a) of the Act.
49. *Time of application and time of decision requirements*
50. For the reasons given with respect to the r.1.09A(3) matters, the Tribunal is satisfied that at the time of application, Mr and Mrs Fulton:
 - were not in a married relationship, for the purposes of s.5F, with each other;
 - had a mutual commitment to a shared life to the exclusion of all others, as required by s.5CB(2)(a);
 - had a genuine and continuing relationship, as required by s.5CB(2)(b); and
 - lived together or did not live separately and apart on a permanent basis, as required by s.5CB(2)(c)(i).
51. Section 5CB(2)(d) of the Act requires that the parties not be related by family. There is nothing in the information before the Tribunal to suggest that, at the time Mr Fulton applied for the visa, he and Mrs Fulton were related by family. To the contrary, in the forms that are on the Department's file, both Mr and Mrs Fulton have stated that they are not related by

blood, marriage or adoption. The Tribunal finds that, at the time of the application, Mr and Mrs Fulton were not related by family. Section 5CB(2)(d) of the Act is therefore met.

52. The Tribunal finds that, at the time Mr Fulton applied for the visa, the requirements in s.5CB(2) of the Act were established.
53. As stated above, the Tribunal is satisfied that Mr and Mrs Fulton are now married, as required by s.5F(2)(a) of the Act. For the reasons given with respect to the r.1.15A(3) matters, the Tribunal is satisfied that at the time of this decision, Mr and Mrs Fulton:
 - have a mutual commitment to a shared life as husband and wife to the exclusion of all others, as required by s.5F(2)(b) of the Act;
 - have a genuine and continuing relationship, as required by s.5F(2)(c) of the Act; and
 - live together, as required by s.5F(2)(d)(i) of the Act.
54. Given these findings the Tribunal is satisfied that, at the time the visa application was made – 16 April 2015 – Mr and Mrs Fulton were in a de facto relationship and that, at the time of this decision, the couple is in a spousal relationship.
55. However, the de facto or spouse requirement in cl.820.211(2)(a)(i) is not the only requirement in cl.820.211(2) which must be satisfied. The sponsorship requirements in cl.820.211(2)(a)(ii) and cl.820.211(2)(c) must also be satisfied and if the applicant was not the holder of a substantive visa at the time of application, then the requirements in cl.820.211(2)(d) must also be satisfied.
56. The delegate noted the following in his decision:
 57. As sponsorship approval is a 'time of application' (Schedule 2) criterion, the applicant must satisfy this criterion at the time of lodging the visa application.
 58. At the time of application you did not you did not provide Form 40SP specifying your sponsor for the purposes of providing sponsorship of your partner visa application.
59. Clause 820.211 to Schedule 2 of the Regulations sets out the criteria to be satisfied at the time of the visa application:
 60. (1) The applicant:
 - (a) is not the holder of a Subclass 771 (Transit) visa; and
 - (b) meets the requirements of subclause (2), (5), (6), (7), (8) or (9).
 61. (2) An applicant meets the requirements of this subclause if:
 62. (a) the applicant is the spouse or de facto partner of a person who:
 63. (i) is an Australian citizen, an Australian permanent resident or eligible New Zealand citizen; and
 64. (ii) is not prohibited by subclause (2B) from being a sponsoring partner; and
 - (c) the applicant is sponsored:

- (i) if the applicant's spouse or de facto partner has turned 18 – by the spouse or de facto partner ...
- 65. Clause 820.111 provides that for the purpose of cl.820.211(2) 'sponsoring partner' means an Australian citizen, Australian permanent resident or eligible New Zealand citizen who was specified in the application as the spouse or de facto partner of the applicant.
- 66. 'Sponsor' is defined in r.1.03 as having the meaning given by r.1.20(1) of the Regulations.
- 67. Subregulation 1.20(1) states:
 - 68. The sponsor of an applicant for a visa is a person (except a person who proposes on the relevant approved form another person for entry to Australia as an applicant for a permanent humanitarian visa) who undertakes the obligations stated in subregulation (2) in relation to the applicant.
- 69. Paragraph 1.20(2)(c) sets out the undertaking to be given by a sponsor for a partner visa as follows:
 - 70. If the application is a concurrent application for a Partner (Provisional) (Class UF) and a Partner (Migrant) (Class BC) visa or a Partner (Temporary) (Class UK) and a Partner (Residence) (Class BS) visa, the sponsor undertakes to assist the applicant, to the extent necessary, financially and in relation to accommodation:
 - (i) If the applicant is in Australia – during the period of 2 years immediately following the grant of the provisional visa; or
 - (ii) If the applicant is outside Australia – during the period of 2 years immediately following the applicant's first entry into Australia after the grant of the provisional or temporary visa.
- 71. The Tribunal notes that r.1.20(1) requires a sponsor to give an undertaking separate to any sponsorship information provided by the visa applicant.
- 72. Mr Fulton's representative submitted that the applicant and sponsor thought they had uploaded a Form 40SP-Sponsorship for a partner to migrate to Australia (Form 40SP) on the Department's system, when the visa application was lodged. The Tribunal notes that the applicant was not represented by a migration agent at this point. Mrs and Mrs Fulton subsequently became aware from the delegate's decision that the Department had not received a Form 40SP completed by the sponsor. They then submitted a further form. In their oral evidence, Mr and Mrs Fulton confirmed this submission. The Tribunal accepts this evidence.
- 73. The Tribunal has reviewed the Tribunal's file and notes that the approved form (Form 40SP-Sponsorship for a partner to migrate to Australia) dated 20 May 2016 was filed with the Department. This accords with the evidence of Mr and Mrs Fulton and the submissions of Mr Fulton's representative. The Tribunal notes that Part K of this document contains provision for an undertaking to be given in writing by a sponsor, as required by r.1.20. The Tribunal therefore finds that Mrs Fulton has filed an approved form as contemplated by r.1.20(2)(c) and has given the undertaking required by that sub regulation.
- 74. Upon analysing the provisions of r.1.03 and r.1.20(1) and (2), the Tribunal finds that the sponsorship requirements set out therein need not be met at the time of the visa application, provided they are met at the time of decision.
- 75. Accordingly the Tribunal is satisfied that at the time of decision the requirements of cl.820.211(2)(c) are met.

76. As Mr Fulton held a substantive visa at the time of application, the further requirements in cl.820.211(2)(d) need not be met.
77. The Tribunal finds that Mr Fulton meets the time of application requirements in cl.820.211(1).
78. With respect to the criteria to be satisfied at the time of decision, the Tribunal finds that Mr Fulton continues to meet the requirements of cl.820.211(2) and so meets cl.820.221(1)(a) and meets the requirements of cl.820.211(2)(c) at the time of decision.
79. Accordingly, the Tribunal finds that Mr Fulton meets both cl.820.211 and cl.820.221.
80. For the reasons given, the Tribunal is satisfied that Mr Fulton also meets the additional criteria prescribed in r.2.03A. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 820 visa.

DECISION

81. The Tribunal remits the application for a Partner (Temporary) (Class UK) visa, with the direction that the applicant meets the following criteria for a Subclass 820 (Partner (Temporary)) visa:
 - Cl.820.211(1)(a) to Schedule 2 to the Regulations;
 - cl.820.211(2)(a) of Schedule 2 to the Regulations;
 - cl.820.211(2)(c) of Schedule 2 to the Regulations;
 - cl.820.221(1)(a) of Schedule 2 to the Regulations.

Amanda Mendes Da Costa
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).